
COMMENT

AVOIDING LEGAL SCRUTINY: THE U.S. RELEASE OF A SUSPECTED ISIL FIGHTER TO AVOID A LEGAL CHALLENGE TO THE WAR ON ISIL

FRANK BROOMELL[†]

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[†] Editor-in-Chief, Volume 167, *University of Pennsylvania Law Review*. J.D., 2019, University of Pennsylvania Law School; M.P.P., 2015, Harvard Kennedy School; B.A., 2009, George Washington University. Many thanks are owed to Professor Jean Galbraith for her feedback and countless insights, as well as to Professor Mark Nevitt for his thoughts. Any mistakes or errors rest with the author.

INTRODUCTION

Justifications put forward by the United States government when it uses military force abroad are almost never directly confronted in the courts.¹ Separation of powers under the U.S. Constitution has led to significant debate throughout the country's history regarding who has the power to act and whether that action can be reviewed by a coordinate branch.² Since 2014, this debate has focused on the power to send U.S. forces into combat against the Islamic State of Iraq and the Levant (ISIL).³ Largely academic up to that point, the debate was given practical import by the U.S. government's decision to intervene in response to significant gains by ISIL throughout Syria and Iraq.⁴ As the President sought to counter ISIL in both countries, he lacked an explicit congressional authorization for the use of military force (AUMF) directed at this new group. While President Barack Obama initially claimed that his authority under Article II of the Constitution permitted him to engage ISIL, his justification later shifted to the 2001 AUMF originally drafted for the fight against Al Qaeda and the Taliban, and eventually to the 2002 AUMF for Iraq as well.⁵

In general, legal challenges to uses of force fail, either for reasons of standing or other justiciability rules,⁶ but the Supreme Court has demonstrated a willingness to address personal liberty issues involved in military detention cases.⁷ This willingness of the courts to intervene when

¹ U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 10 (2011), <https://fas.org/irp/eprint/doj-lethal.pdf> [<https://perma.cc/54MH-AN5U>] ("It is well-established that '[m]atters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention'" (quoting *Haig v. Agee*, 453 U.S. 280, 292 (1981))).

² See, e.g., *I.N.S. v. Chadha*, 462 U.S. 919, 958-59 (1983) (striking down a statute as unconstitutional because it violated the separation of powers delineated in the U.S. Constitution).

³ See, e.g., Olivia Gonzalez, *The Pen and the Sword: Legal Justifications for the United States' Engagement Against the Islamic State of Iraq and Syria (ISIS)*, 39 FORDHAM INT'L L.J. 133, 159 (2015) (noting the debate over whether or not the President had authority to use military force against ISIL). ISIL is also known as the Islamic State of Iraq and al-Sham or the Islamic State of Iraq and Syria (ISIS).

⁴ See Liz Sly & Ahmed Ramadan, *Insurgents Seize Iraqi City of Mosul as Security Forces Flee*, WASH. POST (June 10, 2014), https://www.washingtonpost.com/world/insurgents-seize-iraqi-city-of-mosul-as-troops-flee/2014/06/10/21061e87-8fcd-4ed3-bc94-0e309afoa674_story.html?utm_term=.27960af6f993 [<https://perma.cc/AFA5-UN8S>] (describing ISIL's capture of the second largest city in Iraq and its broader territorial gains across Iraq and Syria).

⁵ See Jack Goldsmith, *Obama's Breathtaking Expansion of a President's Power to Make War*, TIME (Sept. 11, 2014), <http://time.com/3326689/obama-isis-war-powers-bush/> [<https://perma.cc/23LC-JPLD>] (noting the shift in September 2014 of President Obama's justification for the war against ISIL).

⁶ See *Smith v. Obama*, 217 F. Supp. 3d 283, 285 (D.D.C. 2016) (dismissing for standing and justiciability a claim challenging the war against ISIL, brought by a U.S. servicemember deployed to Kuwait in support of that conflict); *Kucinich v. Obama*, 821 F. Supp. 2d 110, 125 (D.D.C. 2011) (holding that members of Congress did not have standing to challenge the 2011 military operations against Libya).

⁷ E.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 604-05 (2004) (plurality opinion) (reaching the merits and holding that due process requires opportunity for detainees to challenge their enemy combatant status).

personal liberty is at stake in detention cases likely drove the U.S. government's decision to release a suspected ISIL fighter.

Faced with the prospect of defending in court its contention that the fight against ISIL was authorized by either Congress or the President's inherent constitutional authority, the government elected to release an ISIL fighter it had been holding in military custody in Iraq.⁸ In September 2017, an American citizen known as John Doe, who had been fighting for ISIL in Syria, was turned over to the American military.⁹ With the support of the ACLU, he challenged his detention and filed a habeas petition in the District Court of the District of Columbia.¹⁰ The government failed in its efforts to have the case dismissed on jurisdictional grounds and was blocked by the courts from transferring Doe to Saudi Arabia prior to a determination that it was legally authorized to detain him. Facing a pending decision by the district court on the merits of the habeas petition, the government released Doe in Bahrain.¹¹ While many factors likely played into this decision by the government, the significant risk of defeat in the courts was almost certainly a major one.

The Non-Detention Act of 1971 (NDA) notes that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."¹² Therefore, to resolve the habeas petition the courts must answer the question of whether or not Congress has authorized the use of force against ISIL and, with it, the detention of American citizen combatants. If Congress has authorized the fight and the detention, then the President is operating at the height of his powers.¹³ On the other hand, if Congress has not authorized the military detention of American citizens in the fight against ISIL, the President will lack the authority to do so because Congress already spoke and prohibited such an action in the NDA.¹⁴

This Comment explores how the resolution of Doe's habeas petition would have required the courts to address the executive branch's authority to wage war—a question that courts have avoided in the Post–World War II era. This Comment will go beyond the positions outlined in the litigation in order

⁸ Stipulation of Dismissal at 1, *Doe v. Mattis*, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 17-2069).

⁹ Robert Chesney, *Doe v. Mattis: The Fact Dispute in the U.S. Citizen Detainee Case*, LAWFARE (Feb. 20, 2018, 2:37 PM), <https://www.lawfareblog.com/doe-v-mattis-fact-dispute-us-citizen-detainee-case> [<https://perma.cc/3UU5-LWUQ>]; Jenna Consigli, *Prosecuting the Islamic State Fighters Left Behind by Wednesday*, LAWFARE (Aug. 1, 2018, 11:34 AM), <https://www.lawfareblog.com/prosecuting-islamic-state-fighters-left-behind> [<https://perma.cc/295A-ZXTM>].

¹⁰ See Robert Chesney, *A Primer on the Legal Dispute in Doe v. Mattis*, LAWFARE (Mar. 9, 2018, 8:13 AM), <https://www.lawfareblog.com/primer-legal-dispute-doe-v-mattis> [<https://perma.cc/5KTB-PAC7>] (outlining the legal issues at play in *Doe v. Mattis*).

¹¹ Stipulation of Dismissal, *supra* note 8, at 1.

¹² 18 U.S.C. § 4001(a) (2018).

¹³ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-36 (1952) (Jackson, J., concurring).

¹⁴ See 18 U.S.C. § 4001(a); *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

to establish the basis for the justiciability of this claim in the historical context. It will also incorporate recent legal writing and judicial opinions trending towards the normalization of foreign policy to apply a standard of deference that does not cede the field to the executive branch, though it still recognizes judicial tendencies towards deference in ambiguous contexts. In doing so, this Comment seeks to address the full scope of the justifications put forward for the fight against ISIL and evaluate the likely outcome the government would have considered if it had to defend its justification for the war against ISIL in court.

Part I of this Comment will explore the factual background of Doe's capture and the progression of his case¹⁵ before going into Part II, which argues that the courts would have found this a justiciable question. Part III examines potential sources of congressional authority for the war against ISIL, including the 2001 and 2002 AUMFs and congressional appropriations. Finally, Part IV rejects the executive branch's claim that it has independent authority to initiate hostilities against ISIL; to the degree that the executive does have that power, Congress's passage of the NDA still would have prohibited the indefinite detention of Doe. With the government lacking legal justification for the war against ISIL and facing the prospect of a judicial decision declaring that fact, the government instead chose to release the fighter.

Finally, this analysis maintains its relevance with the continued captures and detention of U.S. citizens by the Syrian Democratic Forces (SDF).¹⁶ Contrary to the experience with John Doe, the U.S. government quickly

¹⁵ While not the focus of this Comment, the government originally attempted to release Doe back into Syria. Petitioner's Memorandum of Law in Support of His Application for a Preliminary Injunction & Response to Respondent's Supplemental Memorandum at 1, *Mattis*, 288 F. Supp. 3d 195 (No. 17-2069). Doe opposed this release into a "dangerous and war-torn country," *id.*, before the issue was mooted by his release into Bahrain and the dismissal of his case, Stipulation of Dismissal, *supra* note 8, at 1. An earlier attempt to transfer Doe to Saudi Arabia was denied by the D.C. Circuit pending the resolution of Doe's habeas petition. *Doe v. Mattis*, 889 F.3d 745, 748-49 (D.C. Cir. 2018).

¹⁶ One American is Warren Christopher Clark (nom de guerre: Abu Mohammad al-Ameriki) of Houston, Texas. *5 Terrorists Have Been Captured Alive By Our Forces*, SDF PRESS (Jan. 6, 2019), <http://sdf-press.com/en/2019/01/5-terrorists-have-been-captured-alive-by-our-forces/> [<https://perma.cc/W7DG-HHTW>]. Previous reporting indicated that Warren Clark applied to ISIL to become an English teacher for the organization. *See, e.g.*, ALEXANDER MELEAGROU-HITCHENS, SEAMUS HUGHES & BENNETT CLIFFORD, GEORGE WASHINGTON UNIV. PROGRAM ON EXTREMISM, THE TRAVELERS: AMERICAN JIHADISTS IN SYRIA AND IRAQ 57 (2018), <https://extremism.gwu.edu/sites/g/files/zaxdzs2191/f/TravelersAmTravelersAmericanJihadistsinS.pdf> [<https://perma.cc/589R-EZ6N>]. Reporting continues to indicate that among the 2,000 foreign fighters currently detained in Syria, a small number are American. *See* Ryan Browne & Jennifer Hansler, *US Officials Say More Than 2,000 Suspected Foreign ISIS Fighters Being Held in Syria*, CNN (Apr. 17, 2019, 4:32 PM), <https://www.cnn.com/2019/04/17/politics/foreign-isis-fighters-syria/index.html> [<https://perma.cc/3YYN-3326>]. Before August 1, the SDF transferred another Texan, Omer Kuzu, to U.S. custody. *See* Press Release, U.S. Dep't of Justice, *Texas Man Charged with Conspiring to Provide Material Support to ISIS* (Aug. 1, 2019), <https://www.justice.gov/opa/pr/texas-man-charged-conspiring-provide-material-support-isis> [<https://perma.cc/44UJ-KAKM>].

extradited Warren Christopher Clark and Omer Kuzu and charged them in the civilian legal system.¹⁷ Meanwhile, other prisoners claiming to be Americans, such as Lirim Sulejmani, remain in SDF prisons.¹⁸

The prosecutions of Clark and Kuzu demonstrate that when the U.S. government has a clear case, it is willing to quickly act to bring a suspected ISIL member into the civilian justice system. But when the situation is more complicated, as is likely the case for the remaining American SDF prisoners, the legal playing field outlined in this Article will shape U.S. decisionmaking. Accordingly, the U.S. government will likely only take custody if the U.S. is able to quickly bring charges in civilian courts in order to avoid the possibility of litigating its authority to indefinitely detain the ISIL fighter under the AUMF or Article II authority.

I. THE DETENTION OF JOHN DOE

At some point around September 11, 2017, the SDF detained John Doe, a dual U.S.-Saudi national, near ISIL-controlled territory around Dayr az Zur, Syria.¹⁹ Due to his U.S. citizenship, the SDF transferred him to the U.S. military.²⁰ The government alleged that Doe was a member of ISIL and contended that he joined the organization in July 2014.²¹ The government alleged that, after joining the organization, he “was an ISIL fighter recruit, attended an ISIL training camp, swore loyalty to the ISIL leader, and worked for and provided support to ISIL through his work in various capacities for two-and-a-half years, until air strikes and other military offensives against ISIL forced him to flee,” and he was captured by the SDF.²² The SDF found Doe carrying \$4,000 in cash, a GPS device, and a thumb drive containing ISIL administrative spreadsheets as well as instructions for bomb making, the use of various weapons, interrogation techniques, and other “how-to

¹⁷ See Indictment at 1-2, *United States v. Clark*, No. 19-0002 (S.D. Tex. Jan. 23, 2019); Press Release, U.S. Dep’t of Justice, Texas Man Arrested for Attempting to Provide Material Support to a Designated Foreign Terrorist Organization (Jan. 25, 2019), <https://www.justice.gov/opa/pr/texas-man-arrested-attempting-provide-material-support-designated-foreign-terrorist> [<https://perma.cc/S2CP-M9P6>]. Kuzu was captured by the SDF in March 2019 and a criminal complaint was filed under seal in the Northern District of Texas on June 5, 2019. Criminal Complaint ¶ 34, *United States v. Kuzu*, No. 19-0327 (N.D. Tex. June 5, 2019).

¹⁸ Robin Wright, *The Dangerous Dregs of ISIS*, NEW YORKER (Apr. 16, 2019), <https://www.newyorker.com/news/dispatch/the-dangerous-dregs-of-isis> [<https://perma.cc/SW4T-K6Z7>]. Fewer than two dozen prisoners are American, and that number includes both fighters and family members. *Id.*

¹⁹ Respondent’s Factual Return at 2, 32, *Mattis*, 288 F. Supp. 3d 195 (No. 17-2069).

²⁰ *Id.*

²¹ *Id.* at 3.

²² *Id.*

manuals.”²³ The U.S. government also found his name listed as a “fighter” in a separate ISIL document.²⁴

Instead of charging Doe with crimes and bringing him back to civilian custody as has been done with other terrorism suspects,²⁵ the U.S. military detained Doe without access to the courts or an attorney.²⁶ The ACLU asserted that his detention was in violation of the NDA, which stated that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”²⁷ The government contended that Doe’s detention by the military was permitted under three independent authorities: the 2001 AUMF targeting Al Qaeda and the Taliban, the 2002 AUMF targeting Saddam Hussein’s government in Iraq, and the President’s inherent powers under Article II of the Constitution.²⁸

After the ACLU intervened and filed a habeas petition on Doe’s behalf, Judge Tanya Chutkan of the D.C. District Court ordered the government to give the ACLU access to Doe, and the ACLU received permission from Doe to advance his case.²⁹ The government then attempted, but was barred from, transferring Doe to Saudi Arabia.³⁰ With the merits of the habeas petition all that remained before the district court, the government agreed to release Doe in Bahrain.³¹ This allowed the government to avoid a court ruling on the authority of the military to detain Doe and, because the NDA requires an act of Congress to authorize the detention of an American citizen, to avoid a court ruling on whether Congress has granted the executive the authority to wage war against ISIL in Syria and detain American citizens who may take up arms in that fight.³²

²³ *Id.* at 3-4.

²⁴ *Id.* at 4.

²⁵ See, e.g., Adam Goldman & Eric Schmitt, *Benghazi Attacks Suspect is Captured in Libya by U.S. Commandos*, N.Y. TIMES (Oct. 30, 2017), <https://www.nytimes.com/2017/10/30/world/africa/benghazi-attacks-second-suspect-captured.html> [<https://perma.cc/468U-RZXS>] (describing several instances where suspected terrorists were captured by the U.S. military and transferred back to the U.S. to face criminal charges in civilian courts).

²⁶ Petition for a Writ of Habeas Corpus at 2-3, *Mattis*, 288 F. Supp. 3d 195 (No. 17-2069) [hereinafter *Habeas Petition*].

²⁷ *Id.* at 7 (citing 18 U.S.C. § 4001(a) (2018)).

²⁸ Respondent’s Factual Return, *supra* note 19, at 5.

²⁹ *Doe v. Mattis—Challenge to Detention of American by U.S. Military Abroad*, ACLU, <https://www.aclu.org/cases/doe-v-mattis-challenge-detention-american-us-military-abroad> [<https://perma.cc/8F7E-BHWD>] (last updated Oct. 29, 2018).

³⁰ *Mattis*, 288 F. Supp. 3d at 201, *aff’d*, 889 F.3d 745 (D.C. Cir. 2018).

³¹ Stipulation of Dismissal, *supra* note 8, at 1.

³² The desire to dodge a ruling on the war against ISIL may also be the reason that the Trump Administration has thus far balked at plans to send 600 ISIL fighters detained by the SDF to the prison at Guantanamo Bay, Cuba. See Courtney Kube *Trump Admin May Send Captured ISIS Fighters to Iraq Prison, Guantanamo*, NBC NEWS (Aug. 30, 2018, 11:19 AM), <https://www.nbcnews.com/storyline/isis-terror/trump-admin-may-send-captured-isis-fighters-iraq-prison-guantanamo-n905066> [<https://perma.cc/2WJ5-Y2RJ>].

II. THE POLITICAL QUESTION DOCTRINE

In recent decades, the judiciary has generally avoided the question of whether the President is authorized to use force in a given situation by citing the political question doctrine. The political question doctrine prevents judicial review because the doctrine “is primarily a function of the separation of powers.”³³ This has led to incorrect “sweeping statements to the effect that all questions touching foreign relations are political questions.”³⁴ Critics argue that the expansive use of the doctrine is misguided and results from the doctrine being “a tempting refuge from the adjudication of difficult constitutional claims.”³⁵ But in a case like *Doe v. Mattis*, the courts would have been willing to engage on the merits because the historical tradition of the courts and recent Supreme Court decisions involving foreign policy, habeas petitions, and enemy combatants all drive towards that conclusion.³⁶

The political question doctrine has been used by courts at all levels. Lower courts have used it to avoid questions related to the U.S. invasion of Grenada,³⁷ the Vietnam War,³⁸ and most recently the war against ISIL.³⁹ These cases often note that the political question doctrine “excludes from

Moving those prisoners to long-term U.S. custody would allow the ISIL fighters to challenge their detention through habeas petitions. See *Boumediene v. Bush*, 553 U.S. 723, 771 (2008) (holding that the right of habeas corpus applies to detainees at Guantanamo Bay); Tess Bridgeman, Joshua Geltzer & Luke Hartig, *Guantanamo is No Answer—But Here’s What Can Work*, JUST SECURITY (Aug. 31, 2018), <https://www.justsecurity.org/60540/guantanamo-answer-but-heres-work/> [https://perma.cc/EH5F-VH58] (describing challenges the Trump Administration would face if it sent detainees to Guantanamo Bay). However, the Military Commissions Act of 2009 permits the military prosecution of individuals who engage in or support hostilities against U.S. coalition partners, a category that may include the SDF even outside of an authorization to fight ISIL. Military Commissions Act of 2009 § 1802, 10 U.S.C. § 948c (2018). This could allow the U.S. to bring charges against the detainees unrelated to whether or not military force was authorized against ISIL—permitting the government to dodge the question. However, this question is not the focus of this Comment, and such an argument may also fail.

³³ *Baker v. Carr*, 369 U.S. 186, 210 (1962).

³⁴ *Id.* at 211.

³⁵ Harold Koh, *Judicial Constraints: The Courts and War Powers*, in *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES*, 121, 122–23 (Gary Stern & Morton Halperin eds., 1994) (quoting *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1514 (D.C. Cir. 1984) (en banc), *vacated on other grounds*, 471 U.S. 1113 (1985)).

³⁶ Standing is often grounds upon which the courts dismiss use of force challenges, as seen in *Campbell v. Clinton*, where the D.C. Circuit ruled that a congressman did not have standing to challenge President Clinton’s use of force in the Balkans. See generally 203 F.3d 19 (D.C. Cir. 2000). However, in *Doe v. Mattis*, it is clear that Doe faces a harm in being detained by the government and will have standing similar to the petitioners in the military detention cases described *infra* notes 64–74 and accompanying text.

³⁷ Gary Stern & Morton Halperin, *Introduction*, in *THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES*, *supra* note 35, at 1, 8 n.7 (citing *Conyers v. Reagan*, 765 F.2d 1124 (D.C. Cir. 1985)).

³⁸ *Mitchell v. Laird*, 488 F.2d 611, 616 (D.C. Cir. 1973).

³⁹ *Smith v. Obama*, 217 F. Supp. 3d 283, 285 (D.D.C. 2016).

judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the executive branch.”⁴⁰

This deference to the executive branch becomes overly expansive in cases involving military force, such as *Smith v. Obama*. In *Smith*, Judge Colleen Kollar-Kotelly noted that “[q]uestions of statutory construction and interpretation . . . are committed to the Judiciary,” but nonetheless avoided conducting straightforward statutory interpretation.⁴¹ Judge Kollar-Kotelly questioned the ability of the courts to “second-guess the executive’s *application* of these statutes to specific facts on the ground in an ongoing combat mission halfway around the world.”⁴² She noted that such a task would require the courts to determine whether ISIL appropriately falls under the 2001 and 2002 AUMFs by examining the “nature and extent” of ISIL’s relationship to Al Qaeda and whether targeting ISIL is appropriate to defend the U.S. against the continuing threat posed by Iraq.⁴³ As a result, she concluded that this raised questions of fact that the courts are not equipped to handle.⁴⁴

The *Smith* decision relies too strongly on the political question doctrine.⁴⁵ The doctrine focuses on questions of separation of powers and “indeterminate legal standards.”⁴⁶ In examining whether ISIL is a part of Al Qaeda for purposes of the AUMF, the courts can use all of their normal factfinding tools, such as “interrogatories, depositions, testimony, and all the other means of gathering evidence.”⁴⁷ There is no basis to argue that the Constitution requires courts to refrain from decisions regarding questions of law related to the use of military force⁴⁸—in fact, “[i]t is emphatically the province and duty of the judicial department to say what the law is.”⁴⁹ It is striking to see Judge Kollar-Kotelly conclude that the courts have no role in determining whether ISIL is a part of Al Qaeda when the D.C. Circuit has stated that “[w]hether the alleged connections between [a] force and Al Qaeda . . . are sufficient to render it an ‘associated force’ [is a] legal question[] that we review de novo.”⁵⁰

⁴⁰ *Id.* at 297 (quoting *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 840 (D.C. Cir. 2010)).

⁴¹ *Id.* at 299.

⁴² *Id.*

⁴³ *Id.* at 299-300.

⁴⁴ *Id.* at 300.

⁴⁵ See Michael Glennon, *Smith v. Obama: The Political Question Doctrine Misapplied*, JUST SECURITY (Nov. 22, 2016), <https://www.justsecurity.org/34803/smith-v-obama-political-question-doctrine-misapplied/> [<https://perma.cc/8GQ3-RQ63>].

⁴⁶ *Id.* (emphasis removed).

⁴⁷ *Id.*

⁴⁸ LOUIS HENKIN, *FOREIGN AFFAIRS AND THE UNITED STATES CONSTITUTION* 147 (1996).

⁴⁹ Glennon, *supra* note 45 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)).

⁵⁰ Petitioner’s Response to Respondent’s Factual Return at 21 n.9, *Doe v. Mattis*, 288 F. Supp. 3d 195 (D.D.C. 2018) (No. 17-2069) (quoting *Khan v. Obama*, 655 F.3d 20, 26 (D.C. Cir. 2011)).

A. Historical Willingness to Adjudicate Questions Surrounding the Use of Force

From the earliest days of the Republic, the judiciary has felt comfortable addressing whether the executive branch is authorized to use military force. Legal issues that involved foreign policy were “generally addressed in accordance with a traditional, formal structure of constitutionally delegated and reserved powers.”⁵¹ While political issues could create “complex or challenging cases,” the courts did “not refuse to assume jurisdiction even though questions of extreme political importance [were] also . . . involved.”⁵²

At the start of the nineteenth century, the Supreme Court decided cases relating to whether or not Congress had declared war against France during the Quasi-War of 1798–1800 and the extent of the President’s authority under an authorization to direct the use of military force.⁵³ The Quasi-War was sparked by French harassment of U.S. ships at sea and a demand for a bribe by French officials in what became known as the XYZ Affair.⁵⁴ In *Bas v. Tingy*, the Supreme Court found that declarations of Congress had authorized limited hostilities against France even without a declaration of war.⁵⁵ One of the Justices noted that Congress passed legislation in 1799 where it

[r]aised an army; stopped all intercourse with France; dissolved our treaty; built and equipped ships of war; and commissioned private armed ships: enjoining the former and authorizing the latter, to defend themselves against armed ships of France, to attack them on the high seas, to subdue and take them as prize.⁵⁶

The Court comfortably determined that Congress had authorized the conflict.⁵⁷ A year later the Court reaffirmed this willingness to answer the question of whether war was authorized in *Talbot v. Seeman*, and Chief Justice John Marshall wrote that “the acts of [Congress] can alone be resorted to as our guides in this inquiry,” directing the Court to evaluate whether Congress had authorized general or partial hostilities.⁵⁸

The Court went even further a few years later in a dispute over the seizure of a ship in *Little v. Barreme* and concluded that the executive had exceeded the

⁵¹ Ganesh Sitaraman & Ingrid Wuerth, *The Normalization of Foreign Relations Law*, 128 HARV. L. REV. 1897, 1911 (2015) (internal quotations omitted).

⁵² *Id.* at 1912.

⁵³ See Louis Fisher, *Historical Survey of the War Powers and the Use of Force*, in THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES, *supra* note 35, at 11, 14–15.

⁵⁴ JOHN FERLING, JOHN ADAMS: A LIFE 342, 352–54 (1996).

⁵⁵ HAROLD KOH, THE NATIONAL SECURITY CONSTITUTION 81 (1990).

⁵⁶ RANDALL WALTON BLAND, THE BLACK ROBE AND THE BALD EAGLE: THE SUPREME COURT AND THE FOREIGN POLICY OF THE UNITED STATES 1789–1961, at 18 (1999) (quoting *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800)).

⁵⁷ *Bas*, 4 U.S. (4 Dall.) at 46.

⁵⁸ BLAND, *supra* note 56, at 18 (quoting *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801)).

authority given to it by Congress to conduct the Quasi-War.⁵⁹ In *Little*, the Court examined whether a Navy commander violated the law in seizing a ship sailing from a French port when the laws authorizing the hostilities only permitted the seizure of ships sailing to French ports.⁶⁰ The Court ruled that it did not matter that the commander was acting on a presidential order, because the President could not act as Commander in Chief without “any special authority.”⁶¹

In each of these cases, the Supreme Court used traditional tools of constitutional and statutory interpretation in order to determine whether Congress had authorized a conflict and to what extent Congress had authorized the Commander in Chief to execute that conflict. The Court did not shy away from the fact that its decision would have political consequences, because there were clear roles delineated by the Constitution for Congress and the President. As many critics of the expansive use of the political question doctrine have argued, there are adequate standards available for the courts to determine whether war has been authorized.⁶² Francis Wormuth and Edwin Firmage quoted Professor Wormuth’s Vietnam-era scholarship describing the distinction as analogous to the distinctions found in *Marbury v. Madison*:

There are no standards for going to war, and therefore the war power was given to Congress. No suitor may complain because Congress has declared war; and the courts may not take an action because Congress has declared war But the standards to determine whether Congress has exercised its war power are simple and easy to apply. Similarly, in *Marbury v. Madison*, Chief Justice Marshall said that deciding whom to appoint was a political question, but whether an appointment had been made was a justiciable question. The legality of [war] is a justiciable question.⁶³

In a case such as *Doe*, the question was not whether the war against ISIL was justified or wise, but rather whether Congress had exercised its war power. With the tools available to navigate questions surrounding the legality of war in the constitutional system, the courts have a role to play in this debate.

B. *Modern Assertion of the Traditional Role of the Courts*

Following a detour from this approach for much of the twentieth century due to overly broad interpretations of the political question doctrine, the

⁵⁹ *Id.* at 20.

⁶⁰ *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 170 (1804).

⁶¹ BLAND, *supra* note 56, at 20 (quoting *Little*, 6 U.S. (2 Cranch) at 177); accord KOH, *supra* note 55, at 82.

⁶² FRANCIS WORMUTH & EDWIN FIRMAGE, TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW 246 (1989).

⁶³ *Id.* (quoting Francis Wormuth, *The Nixon Theory of the War Power: A Critique*, 60 CALIF. L. REV. 623, 680-81 (1972)).

Supreme Court appears to have once again gained the willingness to apply traditional constitutional and statutory interpretation doctrines to questions of war powers. This has been especially stark since the beginning of the War on Terror as the Court repeatedly limited the President's wartime powers in military detention cases.⁶⁴ One of the earliest cases in this trend, and the most consequential for cases like *Doe*, was *Hamdi v. Rumsfeld*.⁶⁵

Yaser Esam Hamdi is an American citizen who joined the Taliban and was captured while carrying a Kalashnikov rifle on the battlefield in Afghanistan by the U.S.-aligned Northern Alliance.⁶⁶ Once the Northern Alliance learned of Hamdi's citizenship, they turned him over to the United States (just as the SDF did with Doe, Clark, and Kuzu), where he was held in military detention.⁶⁷ Hamdi filed a habeas petition challenging the authority of the military to hold him and the government argued that because this related to military actions, the courts should not be able to second guess the President and instead should defer to the political branches.⁶⁸ The court of appeals initially sided with the government, by denying the request for any hearing on the issue.⁶⁹ The Supreme Court rejected this deference to the government's determination and instead ruled that Hamdi was entitled to notice and a hearing.⁷⁰

The Court pushed even further in ensuing cases, rejecting government claims to deference even in cases involving foreign nationals detained by the military. *Rasul v. Bush* gave military detainees in Guantanamo Bay the right to judicial review of their detention,⁷¹ *Hamdan v. Rumsfeld* struck down the President's military commission system,⁷² and *Boumediene v. Bush* struck down a statute that attempted to deny habeas rights to foreign fighters detained in Guantanamo Bay.⁷³ In each of these cases, the Supreme Court continued to reject the idea that the political question doctrine reserved complicated questions of war to the political branches. Even when Congress and the President act together in the context of war and military conflict,

⁶⁴ Sitaraman & Wuerth, *supra* note 51, at 1921-24.

⁶⁵ 542 U.S. 507 (2004) (plurality opinion).

⁶⁶ AMANDA DiPAOLO, ZONES OF TWILIGHT: WARTIME PRESIDENTIAL POWERS AND FEDERAL COURT DECISION MAKING 70 (2009).

⁶⁷ *Id.*

⁶⁸ *Id.* at 70-71.

⁶⁹ *Id.* at 71.

⁷⁰ *Id.* at 71-72; see Sitaraman & Wuerth, *supra* note 51, at 1922 (describing the *Hamdi* decision).

⁷¹ 542 U.S. 466, 472-73 (2004).

⁷² 548 U.S. 557, 567-68 (2006) (plurality opinion). President Bush established the military commission system without the involvement of Congress in order to create a process for prosecuting enemy combatants detained under the 2001 AUMF. *Id.*

⁷³ 553 U.S. 723, 732-33 (2008); see also Sitaraman & Wuerth, *supra* note 51, at 1922-23 (describing the "unexpected and remarkable" series of losses the government experienced in these post-9/11 Supreme Court cases).

Boumediene stands for the proposition that they cannot go beyond the limits of the Constitution because “[t]he laws and Constitution are designed to survive, and remain in force, in extraordinary times.”⁷⁴

These military detention cases and the cases from the early 1800s are particularly notable because they came at times of heightened concern about the security of the country. The Quasi-War cases show that “even during America’s infancy, the time of its greatest national insecurity, foreign affairs were not treated as exempt from the ordinary constitutional system of checks and balances.”⁷⁵ The military detention cases, meanwhile, demonstrate that “[i]n the context of wartime exigency, in which exceptionalist arguments should be at their strongest and in which the executive branch relied upon those arguments,” the Supreme Court continued to evaluate the merits of the cases and find them justiciable.⁷⁶ *Doe v. Mattis* certainly involved wartime exigency and concern about national security, but it stands out no more than *Hamdi*, which occurred in the wake of the worst terror attack on U.S. soil, or the Quasi-War cases, which occurred in the earliest days of the Republic, when the nation’s future was still uncertain.

The current Supreme Court recently broke with the political question doctrine “in broad and sweeping terms” in *Zivotofsky v. Clinton*.⁷⁷ In *Zivotofsky*, the government argued, and lower courts held, that the political question doctrine prevented the courts from adjudicating the case.⁷⁸ The Supreme Court rejected those arguments and abandoned the guidance of *Baker v. Carr*, instead emphasizing “the power—and obligation—of the courts to resolve foreign relations cases, even ones that involve difficult separation of powers questions.”⁷⁹ Chief Justice John Roberts wrote:

The federal courts are not being asked to supplant a foreign policy decision of the political branches with the courts’ own unmoored determination of what United States policy . . . should be. Instead [the petitioner] requests that the courts enforce a specific statutory right. To resolve his claim, the Judiciary must decide if [his] interpretation of the statute is correct . . . This is a familiar judicial exercise.⁸⁰

As a result, based on the history of the Court’s willingness to answer these types of questions and the current Court’s demonstrated willingness and ability to conduct a “familiar judicial exercise” in evaluating congressional

⁷⁴ *Boumediene*, 553 U.S. at 798.

⁷⁵ KOH, *supra* note 55, at 83.

⁷⁶ Sitaraman & Wuerth, *supra* note 51, at 1924.

⁷⁷ *Id.* at 1925.

⁷⁸ *Id.*

⁷⁹ *Id.* at 1925–26.

⁸⁰ *Zivotofsky ex rel. Zivotofsky v. Clinton (Zivotofsky I)*, 566 U.S. 189, 196 (2012).

authorizations and executive actions, *Doe v. Mattis* would have been heard on the merits so that the court could interpret the AUMFs and determine whether the executive had the authority to indefinitely detain Doe.⁸¹ Should the U.S. government take custody of any of the remaining American SDF prisoners without bringing criminal charges, this same analysis will lead courts directly to the merits of their inevitable habeas challenges.

III. CONGRESSIONAL AUTHORIZATION

One avenue for justifying the military detention of an American citizen accused of joining ISIL is congressional authorization. The Non-Detention Act of 1971 states that “[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”⁸² No law has been passed to explicitly authorize the military detention of American citizens fighting on behalf of ISIL,⁸³ but an authorization to use military force carries an implied authorization to detain enemy combatants pursuant to the laws of war.⁸⁴ The outstanding question, then, is whether Congress has authorized the use of military force against ISIL.

A. *The Arguments for and against Doe’s Detention Under the 2001 AUMF and the 2012 NDAA*

Following the 9/11 attacks, Congress authorized the executive to use force against those responsible. The 2001 AUMF against Al Qaeda and the Taliban states:

That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned,

⁸¹ “[U]nder the Constitution, one of the judiciary’s characteristic roles is to interpret statutes, and we cannot shirk from this responsibility merely because our decision may have significant political overtones.” Koh, *supra* note 35, at 123 (quoting *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221, 230 (1986)).

⁸² 18 U.S.C. § 4001(a) (2018).

⁸³ The Military Commissions Act notably applies only to non-citizens. Military Commissions Act of 2009 § 1802, 10 U.S.C. § 948c (2018). The military detention language of the 2012 National Defense Authorization Act noted that its provisions shall not “be construed to affect existing law or authorities relating to the detention of United States citizens.” National Defense Authorization Act for Fiscal Year 2012 (2012 NDAA), Pub. L. No. 112-81, § 1021(e), 125 Stat. 1298, 1562 (2011). Since Congress has not changed its position on the military detention of U.S. citizens as reflected in the Non-Detention Act of 1971, the Non-Detention Act is still binding. The history of the act will be further discussed *infra* Part IV.

⁸⁴ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (plurality opinion) (finding the 2001 AUMF provided authorization for the detention of U.S. citizens as enemy combatants when fighting on behalf of Al Qaeda or the Taliban). A more restrictive view was articulated by Justice Scalia and asserted that the AUMF did not authorize the military detention of U.S. citizens, but it only gained the support of one other Justice. *Id.* at 554 (Scalia, J., dissenting) (joined by Stevens, J.).

authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.⁸⁵

This statement was scaled back from an initial request by President George W. Bush for an authorization to “deter and pre-empt any future acts of terrorism or aggression against the United States without regard to the entities involved.”⁸⁶ In instituting this restriction, Congress refused to authorize the use of force against those unconnected to 9/11, even if it meant that the President may be restricted in preventing other terrorist attacks.⁸⁷ As a result, the focus of the 2001 AUMF is on Al Qaeda and the Taliban.

In *Hamdi*, the Court ruled that this authorization contained an implied authorization from Congress to detain U.S. citizens if they were captured as enemy combatants fighting on behalf of Al Qaeda or the Taliban.⁸⁸ This is because “[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by universal agreement and practice, are important incident[s] of war.”⁸⁹ Accordingly, “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war, [so] in permitting the use of ‘necessary and appropriate force,’ Congress has clearly and unmistakably authorized detention”⁹⁰ In other words, because Congress had authorized the use of force against the Taliban, Hamdi could be held for the duration of hostilities.⁹¹

1. Associated Forces

To justify the military detention of Doe or any other American citizen, the government would need to show that ISIL is covered by the 2001 AUMF, which was directed at those who “authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001.”⁹² While ISIL did not exist on September 11, 2001, the government contends that ISIL is covered as either a part of Al Qaeda or as an associated force of Al Qaeda.⁹³ Whether or not the 2001 AUMF includes implied coverage of associated forces of Al

⁸⁵ Authorization for Use of Military Force (2001 AUMF), Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

⁸⁶ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2079 (2005) (internal quotations omitted).

⁸⁷ *Id.*

⁸⁸ *Hamdi*, 542 U.S. at 517 (plurality opinion).

⁸⁹ *Id.* at 518 (alteration in original) (internal quotations omitted).

⁹⁰ *Id.* at 519.

⁹¹ *Id.* at 521.

⁹² 2001 AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

⁹³ Respondent’s Factual Return, *supra* note 19, at 14.

Qaeda and the Taliban is a disputed point;⁹⁴ however, it is an argument that the D.C. Circuit has picked up,⁹⁵ and the government routinely refers to the Curtis Bradley and Jack Goldsmith article on this topic.⁹⁶ Yet even when taking the approach of the government, the argument still ultimately fails because ISIL does not meet the government's definition of an associated force.

An associated force fills an analogous role to co-belligerents in a traditional war.⁹⁷

Terrorist organizations that act as agents of al Qaeda, participate with al Qaeda in acts of war against the United States, systematically provide military resources to al Qaeda, or serve as fundamental communication links in the war against the United States, and perhaps those that systematically permit their buildings and safehouses to be used by al Qaeda in the war against the United States⁹⁸

can be considered associated forces and covered by the authorities included in the 2001 AUMF.⁹⁹ This interpretation was reaffirmed by the 2012 National Defense Authorization Act, where Congress affirmed that the President could use "all necessary and appropriate force" against those who conducted the 9/11 attacks and those who are "a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities against the United States or its coalition partners."¹⁰⁰

The government has defined an associated force of Al Qaeda or the Taliban to be (1) "an organized, armed group that has entered the fight alongside al-Qa'ida or the Taliban," and (2) "the group must be a co-belligerent with al-Qa'ida or the Taliban in hostilities against the United States or its coalition partners."¹⁰¹ A 2016 White House report on current use-

⁹⁴ Compare, e.g., Bradley & Goldsmith, *supra* note 86, at 2109-10 (arguing that today, Al Qaeda operates through a "confederacy of affiliated terrorist organizations around the world that it inspires, leads, and supports"), with Rebecca Ingber, *Co-Belligerency*, 42 YALE J. INT'L L. 67, 73 (2017) ("This theory . . . rests on flawed doctrinal grounds, both in its application of largely obsolete neutrality law principles designed for states to a modern conflict with a non-state terrorist group, and in its overstating of the consequences of a neutrality breach under that historic body of law.").

⁹⁵ See *Khan v. Obama*, 655 F.3d 20, 23 (D.C. Cir. 2011) ("We have held that the AUMF grants the President authority (inter alia) to detain individuals who are 'part of forces associated with Al Qaeda or the Taliban.'" (quoting *Al-Bihani v. Obama*, 590 F.3d 866, 872 (D.C. Cir. 2010))).

⁹⁶ E.g., Respondent's Factual Return, *supra* note 19, at 14 (citing Bradley & Goldsmith, *supra* note 86).

⁹⁷ Bradley & Goldsmith, *supra* note 86, at 2113.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ 2012 NDAA, Pub. L. No. 112-81, § 1021 (a)–(b), 125 Stat. 1298, 1562 (2011).

¹⁰¹ WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 4 (2016) [hereinafter 2016 WHITE HOUSE REPORT]; Respondent's Factual Return, *supra* note 19, at 15.

of-force authorities noted that “a group is not an associated force simply because it aligns with al-Qa’ida or the Taliban or embraces their ideology.”¹⁰²

The government concluded that ISIL is an associated force of Al Qaeda because of ISIL’s history. The government traced the formation of ISIL back to Abu Mu’sab al-Zarqawi’s decision to merge his group with Al Qaeda and form Al Qaeda in Iraq (AQI).¹⁰³ AQI engaged in attacks against U.S. and coalition forces through the U.S. withdrawal from Iraq in 2011.¹⁰⁴ In 2006, AQI changed its name to the Islamic State of Iraq (ISI) and began claiming attacks under that name.¹⁰⁵ When Osama Bin Laden was killed by U.S. forces in 2011, ISI pledged allegiance to his successor, Ayman al-Zawahiri.¹⁰⁶ In 2013, ISI expanded operations into Syria and changed its name to the Islamic State in Iraq and al-Sham, which the State Department recognized as ISIL in 2014.¹⁰⁷ Accordingly, the government argues that “ISIL basically is al-Qaeda in Iraq.”¹⁰⁸

2. Appropriate Deference in Foreign Policy: *Curtiss-Wright* to *Chevron*

Courts evaluating a case involving ISIL detainees therefore must determine what deference to give the government’s interpretation of the 2001 AUMF. The courts could question whether the AUMF covers associated forces, whether the government’s definition of associated forces is appropriate, or whether the government has properly applied its definition to the facts. Alternatively, the courts could defer entirely to the government’s interpretation.

Many have argued that great deference should be granted to the executive for any delegation related to foreign policy.¹⁰⁹ Taken to the extreme, this would mean that since Congress delegated the authority to use force against those who “planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001,”¹¹⁰ the executive should be free to determine who is an associated force of Al Qaeda and use military force accordingly.

¹⁰² 2016 WHITE HOUSE REPORT, *supra* note 101, at 4-5.

¹⁰³ *Id.* at 5.

¹⁰⁴ *Id.* at 5-6.

¹⁰⁵ Respondent’s Factual Return, *supra* note 19, at 9.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 9-10.

¹⁰⁸ *Id.* at 10 (quoting *Hearing Before the H. Comm. on Foreign Affairs on Al-Qaeda’s Resurgence in Iraq: A Threat to U.S. Interests*, 113th Cong. 6 (2014) (testimony of Brett McGurk, Deputy Assistant Secretary for Iraq and Iran, Bureau of Near Eastern Affairs, U.S. Department of State)).

¹⁰⁹ See Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1546-48 (2004) (summarizing the debate around nondelegation in foreign policy, including Justice Rehnquist’s belief that “nondelegation simply does not apply in the field of foreign affairs” (internal quotation marks omitted)).

¹¹⁰ 2001 AUMF, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

This more expansive interpretation stems from *United States v. Curtiss-Wright Export Corp.*¹¹¹ In *Curtiss-Wright*, the Court held that the normal limitations on restrictions against overly broad delegations from Congress to the executive did not apply in foreign policy.¹¹² Justice George Sutherland based this decision on three parts. First, he argued that sovereignty over foreign affairs was passed from the British Crown to the colonial government after the Declaration of Independence and accordingly existed outside of the Constitution and could not be limited by Article I.¹¹³ However, this argument has been rejected by the Supreme Court, and conflicts with even a cursory reading of our nation's history, because "[t]he United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution."¹¹⁴

Second, Justice Sutherland reasoned that expansive delegations in foreign affairs were permitted because "the President is the sole organ of the government in its external relations, and its sole representative with foreign nations."¹¹⁵ While this was dicta, the assertion has carried significant weight over the years and is still cited by the executive branch.¹¹⁶ Yet this ignores the fact that the Founding Fathers divided the powers over foreign policy, especially those pertaining to war, between the branches of government—the same type of division that gives rise to the nondelegation doctrine in the first place.¹¹⁷

The third element of Justice Sutherland's opinion was that there was a longstanding practice of Congress delegating authority to the President in cases of international commerce so that the President could determine whether or not to enforce a statute.¹¹⁸ This was a question of trade and communication with foreign nations and the ability of Congress to delegate decisionmaking, not a question of the President's "unrestricted judgment" with regards to war.¹¹⁹

Given the constitutional and relevancy concerns with using *Curtiss-Wright* as precedent, the court must then determine what standards should be used. As described in Part IV, *Youngstown Sheet & Tube Co. v. Sawyer* provides an

¹¹¹ 299 U.S. 304 (1936).

¹¹² *Id.* at 320-22.

¹¹³ WORMUTH & FIRMAGE, *supra* note 62, at 211 (citing *Curtiss-Wright*, 299 U.S. at 316).

¹¹⁴ WORMUTH & FIRMAGE, *supra* note 62, at 212 (quoting *Reid v. Covert*, 354 U.S. 1, 5-6 (1957)); *accord* *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076, 2116 (2015) (Scalia, J., dissenting) ("The People of the United States had other ideas when they organized our government.").

¹¹⁵ WORMUTH & FIRMAGE, *supra* note 62, at 212 (quoting *Curtiss-Wright*, 299 U.S. at 319).

¹¹⁶ *Zivotofsky II*, 135 S. Ct. at 2089-90.

¹¹⁷ *Id.* at 2087-88.

¹¹⁸ WORMUTH & FIRMAGE, *supra* note 62, at 213-14 (quoting *Curtiss-Wright*, 299 U.S. at 329).

¹¹⁹ *Id.* at 214.

appropriate analytical framework for evaluating presidential power in the context of congressional action or inaction,¹²⁰ but the courts must first determine what Congress said in the 2001 AUMF. Throughout the twentieth century, the Court repeatedly turned to *Schechter Poultry*¹²¹ and the traditional nondelegation cases—and not *Curtiss-Wright*—when evaluating foreign policy cases.¹²² This implies that the courts should not defer entirely to the executive's interpretation of the AUMF and instead the courts should interpret the statute more narrowly to avoid any nondelegation doctrine problems.¹²³

Moving away from *Curtiss-Wright* leaves open the question of what deference should be applied in foreign policy. There is significant scholarship discussing the appropriate level of deference that the courts should grant to the executive. Some argue that there should be no deference and courts should “scrutinize executive action closely” when the executive is interpreting law that is made partly outside the executive and that limits the exercise of executive power.¹²⁴ Others have argued for *Chevron*-level¹²⁵ deference even when Congress has not delegated authority to the executive branch, reasoning that the executive branch is more politically accountable for foreign policy decisions.¹²⁶ This Comment will focus on a style that is more restrictive than *Curtiss-Wright*, but still deferential to the executive branch when the law is unclear. Accordingly, the focus will be on *Chevron* and *Skidmore* deference and, in doing so, this Comment will align with the sentiment of Part II above, which demonstrated that the courts already have the tools to handle these types of cases.¹²⁷

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc. established a two-step process to evaluating executive branch actions: “the Court first asks whether the statute speaks to the precise issue clearly, and if not, the Court

¹²⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring).

¹²¹ The nondelegation doctrine restricts the delegation from Congress to the President of powers explicitly reserved to the legislative branch by the Constitution. *See, e.g., A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-52 (1935).

¹²² *WORMUTH & FIRMAGE*, *supra* note 62, at 215-18.

¹²³ *See Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 646 (1980) (“A construction of the statute that avoids this kind of open-ended grant [of legislative power] should certainly be favored.”).

¹²⁴ Derek Jinks & Neal K. Katyal, *Disregarding Foreign Relations Law*, 116 YALE L.J. 1230, 1234, 1239 (2007).

¹²⁵ *See infra* notes 127-129 and accompanying text.

¹²⁶ Ingrid Wuerth, Kiobel v. Royal Dutch Petroleum Co.: *The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601, 613-15 (2013) (noting that Congress did not delegate authority to the President in the Alien Tort Statute but that some writers have made a “facially appealing argument” that *Chevron*-level deference should apply anyway).

¹²⁷ *See, e.g., Sitaraman & Wuerth*, *supra* note 51, at 1959 (“Normalizing deference . . . involves adopting administrative law’s deference doctrines Under *Mead*, when an agency has been delegated authority and exercises that authority to interpret the statute, and that interpretation has the force of law, then the interpretation is eligible for *Chevron* deference.” (footnotes omitted)).

then defers to an agency's reasonable interpretation of the statute."¹²⁸ Where a ruling falls outside of *Chevron*, it can be given *Skidmore* deference¹²⁹ due to the "specialized experience and broader investigations and information available to the agency."¹³⁰ While the 2001 AUMF does not include a formal delegation of rulemaking or adjudicatory powers, it can be seen to have an "indication of a comparable congressional intent."¹³¹

3. Deferring on the Question of Law, but Lacking Facts to Establish that ISIL Is an Associated Force

The 2001 AUMF does not explicitly define associated forces, or even include a mention of the term (although the 2012 NDAA does), but assuming that the AUMF has given the executive rulemaking or adjudicatory powers would allow the courts to defer to the executive's definition of the term. Given the Court's willingness to read the 2001 AUMF to include an authority to detain American citizens because it is a necessary part of war,¹³² the Court will likely find a similar justification to allow the U.S. to use force against those entities that join forces with Al Qaeda against the United States.¹³³ Such a need to combat all those who may fight alongside Al Qaeda in order to defeat Al Qaeda appears to be the type of thing considered a necessary part of war. Accordingly, the government's definition of an associated force provides guidance for the courts.¹³⁴

The courts must therefore assess the government's facts to see if there is "a rational connection between the evidence and their ultimate conclusion."¹³⁵ The government must show facts to establish that ISIL is (1) an "organized, armed group that has entered the fight alongside al-Qa'ida" and (2) "a co-belligerent with al-Qa'ida . . . in hostilities against the United States or its coalition

¹²⁸ *Id.* (citing *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

¹²⁹ When Congress has not delegated authority, *Skidmore v. Swift & Co.* stands for the proposition that the interpretations of the executive branch can provide "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." 323 U.S. 134, 140 (1944).

¹³⁰ *United States v. Mead Corp.*, 533 U.S. 218, 234 (2001) (internal quotations omitted); *accord* *Sitaraman & Wuerth*, *supra* note 51, at 1959.

¹³¹ *Sitaraman & Wuerth*, *supra* note 51, at 1965 (citing Cass R. Sunstein, *Administrative Law Goes to War*, 118 HARV. L. REV. 2663, 2665-67 (2005)).

¹³² *See* *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (plurality opinion).

¹³³ *See* *Bradley & Goldsmith*, *supra* note 86, at 2110 ("[A] terrorist organization that joins al Qaeda in its conflict with the United States, even after September 11, can be viewed as part of the 'organization' against which Congress authorized force.").

¹³⁴ 2016 WHITE HOUSE REPORT, *supra* note 101, at 4-5.

¹³⁵ *Sitaraman & Wuerth*, *supra* note 51, at 1967 (noting that the courts routinely conduct this type of analysis when the government asserts that an entity supports terrorism).

partners.”¹³⁶ The government has laid out a number of strong facts tying ISIL to Al Qaeda,¹³⁷ but it has not adequately addressed all of the relevant facts.¹³⁸

The government fails to fully address the split between ISIL and Al Qaeda that occurred in 2014. At the same time that ISIL was expanding into Syria, Al Qaeda created Jabhat al-Nusra (or the al-Nusra Front) as a separate group.¹³⁹ In 2013, ISIL and Al Qaeda leadership began a dispute over who was the official Al Qaeda affiliate in Syria, with ISIL ultimately rejecting Al Qaeda leadership’s orders to recognize Jabhat al-Nusra.¹⁴⁰ This led to Al Qaeda disavowing ISIL and ending their affiliation.¹⁴¹ As the State Department testified at the time, “Zawahiri has publicly distanced the AQ leadership from ISIL’s unpopular actions against Syria’s Sunni population, and it now appears that ISIL is conducting operations in Syria and Iraq entirely independent of any counsel or assistance from AQ core leadership.”¹⁴²

This dispute was not simply a war of words. ISIL and Al Qaeda went to war with one another. ISIL was quick to assassinate a senior Al Qaeda operative in Syria,¹⁴³ and hundreds of fighters were killed in fighting between Jabhat al-Nusra and ISIL.¹⁴⁴ As the fighting between the two groups continued, the leader of al-Nusra declared “There is no solution between us and them in the meantime, or in the foreseeable future We hope they repent to God and return to their senses . . . if not, then there is nothing but fighting between us.”¹⁴⁵

¹³⁶ 2016 WHITE HOUSE REPORT, *supra* note 101, at 4.

¹³⁷ See *supra* notes 100–107 and accompanying text.

¹³⁸ “Co-belligerent” does not have a clear definition in international law though it has historically been analogous to “ally.” See Ingber, *supra* note 94, at 80 (“It is a label for entities, historically states—and in particular *belligerent* states—that have joined an armed conflict on the side of one of the parties. It is similar in meaning to ‘ally,’ though it lacks any requirement for the formal ties that label suggests.” (footnotes omitted)).

¹³⁹ Daniel L. Byman & Jennifer R. Williams, *ISIS vs. Al Qaeda: Jihadism’s Global Civil War*, BROOKINGS (Feb. 24, 2015), <https://www.brookings.edu/articles/isis-vs-al-qaeda-jihadisms-global-civil-war/> [<https://perma.cc/W9T9-RREP>].

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Respondent’s Factual Return, *supra* note 19, at 11 n.23 (citing *Hearing*, *supra* note 108 (testimony of Brett McGurk, Deputy Assistant Secretary for Iraq and Iran, Bureau of Near Eastern Affairs, U.S. Department of State)).

¹⁴³ *Senior Al-Qaeda Figure Killed by ISIS*, DAILY STAR (Feb. 24, 2014, 12:21 AM), <http://www.dailystar.com.lb/News/Middle-East/2014/Feb-24/248278-senior-al-qaeda-figure-killed-by-isis.ashx#axzz2u6nIcwPB> [<https://perma.cc/3SHE-FBE4>].

¹⁴⁴ See, e.g., *Hundreds Killed as ISIL Insurgents Gain Ground in East Syria*, REUTERS (June 10, 2014, 7:17 AM), <https://www.reuters.com/article/us-syria-crisis-rebels/hundreds-killed-as-isil-insurgents-gain-ground-in-east-syria-idUSKBN0EL10R20140610?irpc=932> [<https://perma.cc/Q9LA-PL7G>].

¹⁴⁵ *Nusra Leader: No End to Conflict with ISIL in Syria*, AL JAZEERA (June 4, 2015), <https://www.aljazeera.com/news/2015/06/nusra-leader-conflict-isil-syria-150604021024858.html> [<https://perma.cc/NAK6-WYLV>].

Internationally, the decision about whether to align with ISIL or Al Qaeda has led to fighting, assassinations, and splits between groups.¹⁴⁶

The direct fighting and rivalry for influence both in Syria and in the broader jihadist movement makes it impossible to conclude that there is a rational connection between the evidence available and the government's conclusion that ISIL is an associated force of Al Qaeda. While ISIL at one time did enter the fight alongside Al Qaeda, it cannot be said to be a co-belligerent of Al Qaeda at least since the start of 2014.¹⁴⁷ Returning to the Bradley and Goldsmith definition of co-belligerency in the War on Terror, ISIL since 2014: has not participated with Al Qaeda in acts of war against the U.S.; has not systematically provided resources to al Qaeda, or served as a fundamental communications link for Al Qaeda; and has not systematically permitted Al Qaeda to use its buildings, safehouses, or territories.¹⁴⁸ The timing of Doe's capture mattered because courts that have evaluated the associated-force question in the context of detention proceedings have focused on whether or not the entity in question was an associated force of Al Qaeda or the Taliban at the time an individual was detained.¹⁴⁹ Therefore in 2017, when Doe was brought into U.S. custody, ISIL could not be considered "a co-belligerent with al-Qa'ida . . . in hostilities against the United States or its coalition partners."¹⁵⁰

The government has two primary counterarguments. The first is that by failing to treat ISIL as an associated force the courts "would allow an enemy force—rather than the President and Congress—to control the scope of the 2001 AUMF by splintering into rival factions while continuing to prosecute the same conflict against the United States."¹⁵¹ On its face, this is a valid concern. We would not want nonstate actors to be able to manipulate an authorization to use military force simply by changing their name. But this is not simply a name change or a split designed to evade U.S. military action.

¹⁴⁶ Goktug Sonmez, *Violent Extremism Among Central Asians: The Istanbul, St. Petersburg, Stockholm, and New York City Attacks*, 10 CTC SENTINEL, Dec. 2017, at 14, 16 (describing fighting between the Islamic Movement of Uzbekistan (IMU) and the Taliban after the IMU switched loyalty to ISIL and a subsequent split in IMU as some fighters sought to realign with the Taliban and Al Qaeda).

¹⁴⁷ See CHARLIE SAVAGE, POWER WARS: INSIDE OBAMA'S POST-9/11 PRESIDENCY 688 (2015) ("[T]he President's gambit [to define ISIL as an associated force of Al Qaeda] is, at bottom, presidential unilateralism masquerading as implausible statutory interpretation." (quoting Goldsmith, *supra* note 5)).

¹⁴⁸ See Bradley & Goldsmith, *supra* note 86, at 2113.

¹⁴⁹ Petitioner's Response to Respondent's Factual Return, *supra* note 50, at 24 (citing *Khan v. Obama*, 655 F.3d 20, 32-33 (D.C. Cir. 2011)).

¹⁵⁰ 2016 WHITE HOUSE REPORT, *supra* note 101, at 4. The courts should not defer to unsupported assertions by the executive branch. In recent years the Supreme Court has refused to do so—even rejecting the executive branch's factual assessments of military necessity in *Boumediene v. Bush*. Robert Knowles, *Warfare as Regulation*, 74 WASH. & LEE L. REV. 1953, 1990 (2017).

¹⁵¹ 2016 WHITE HOUSE REPORT, *supra* note 101, at 6.

There is reason to believe that Jabhat al-Nusra's recent separation from Al Qaeda is such a split designed to evade targeting, but it would be easy for the government to provide unclassified evidence demonstrating the façade.¹⁵² The Jabhat al-Nusra "split" with Al Qaeda involved no violence, no public rivalry for members or power, and was apparently done on good terms. The ISIL–Al Qaeda split was the opposite and involved assassinations and intense fighting over territory in Syria.¹⁵³ Based on these examples in Syria alone, the U.S. government would be able to provide the courts with sufficient facts to demonstrate whether a name change or a split between jihadist groups covered under an AUMF is something that has been put on for show or a real falling out between entities as they lose co-belligerent status. This is exactly the type of factfinding that Article III courts are authorized to do.

The second counterargument is that ISIL has continued to carry out attacks in Syria and terrorist operations around the world.¹⁵⁴ The government notes that ISIL was heavily involved in fighting in Syria while kidnapping civilians, aid workers, and reporters, and has been responsible for large-scale attacks in the West and inspiring others to commit attacks in their name.¹⁵⁵ ISIL even claims to be "the true executor of bin Laden's legacy."¹⁵⁶ Yet this argument ignores the fact that the case against counting ISIL as an associated force of Al Qaeda is not that ISIL is a force for good. ISIL is a terrorist organization that must be countered. However, as noted earlier, the White House has stated that "a group is not an associated force simply because it aligns with al-Qa'ida or the Taliban or embraces their ideology. Merely engaging in acts of terrorism or merely sympathizing with al-Qa'ida . . . is not enough to bring a group within the scope of the 2001 AUMF."¹⁵⁷ ISIL's claim to the legacy of bin Laden and its continued attacks are reason for concern and would serve as prime justification for congressional action but are not justification for inclusion as an associated force under the 2001 AUMF.

¹⁵² Yasir Abbas, *How Al Qaeda is Winning in Syria*, WAR ON THE ROCKS (May 10, 2016), <https://warontherocks.com/2016/05/how-al-qaeda-is-winning-in-syria/> [<https://perma.cc/6LZN-6PA4>] (examining how Jabhat al-Nusra has cautiously grown its power and influence in Syria, having learned from the backlash that Al Qaeda inspired by acting too harshly in Iraq). *See generally* CHARLES LISTER, THE BROOKINGS PROJECT ON U.S. RELATIONS WITH THE ISLAMIC WORLD, PROFILING JABHAT AL-NUSRA (2016), https://www.brookings.edu/wp-content/uploads/2016/07/Brookings-Analysis-Paper_Charles-Lister_Web.pdf [<https://perma.cc/7L2E-RSJR>] (detailing the history of Jabhat al-Nusra and some of the considerations that likely went into the decision to officially split with Al Qaeda).

¹⁵³ *See supra* notes 138–145 and accompanying text.

¹⁵⁴ Respondent's Factual Return, *supra* note 19, at 11.

¹⁵⁵ *Id.*

¹⁵⁶ 2016 WHITE HOUSE REPORT, *supra* note 101, at 6.

¹⁵⁷ *Id.* at 4–5.

Since ISIL should not be considered an associated force, the government would not be able to use the 2001 AUMF as a justification for holding Doe.¹⁵⁸

B. *The Arguments for and Against Doe's Detention Under the 2002 Iraq AUMF*

The U.S. government also points to Congress's authorization for the war against Saddam Hussein's government as justification for the war against ISIL. The 2002 Authorization for Use of Military Force against Iraq authorized the President to use the military as "he determines to be necessary and appropriate in order to . . . defend the national security of the United States against the continuing threat posed by Iraq" and to "enforce all relevant United Nations Security Council resolutions regarding Iraq."¹⁵⁹ While disputed, this likely also included an implied authorization to use force against any immediate threats arising in the aftermath of the invasion of Iraq.¹⁶⁰ However, the government stretches this authority too far.¹⁶¹

First, the authority of the 2002 AUMF likely expired early in the morning on December 18, 2011. That is when "[t]he last convoy of U.S. soldiers pulled out of Iraq . . . ending nearly nine years of war."¹⁶² In the lead up to the final withdrawal in December, the President declared the end of the war in Iraq¹⁶³ and turned over all detainees in U.S. military custody to the Iraqi

¹⁵⁸ Legislation proposed by Senators Bob Corker and Tim Kaine would have provided authorization for the war against ISIL and therefore the detention of Doe; however, it died in Congress. Authorization for Use of Military Force of 2018, S.J. Res. 59, 115th Cong. (2018).

¹⁵⁹ Authorization for Use of Military Force Against Iraq Resolution of 2002 (2002 AUMF), Pub. L. No. 107-243, § 3(a), 116 Stat. 1498, 1501 (2002).

¹⁶⁰ Robert Chesney argues that

the 2002 AUMF would be best read as implicitly conferring the authority to keep troops in the field there in an effort to clean up our own mess, as it were (or at least to try to do so), as an organic extension of the authority to cause that mess in the first place.

Robert Chesney, *A Response to Bruce Ackerman: Whether the 2001 and 2002 AUMFs Are Exhausted*, LAWFARE BLOG (Sept. 8, 2011, 11:05 AM), <https://lawfareblog.com/response-bruce-ackerman-whether-2001-and-2002-aumfs-are-exhausted> [<https://perma.cc/W3CX-9ZBD>].

¹⁶¹ See WHITE HOUSE, REPORT ON THE LEGAL AND POLICY FRAMEWORKS GUIDING THE UNITED STATES' USE OF MILITARY FORCE AND RELATED NATIONAL SECURITY OPERATIONS 3 (2018), <https://assets.documentcloud.org/documents/4411804/3-18-War-Powers-Transparency-Report.pdf> [<https://perma.cc/SW5H-CHT8>] [hereinafter 2018 WHITE HOUSE REPORT] (concluding that the 2002 AUMF provides justification for the war against ISIL).

¹⁶² Joseph Logan, *Last U.S. Troops Leave Iraq, Ending War*, REUTERS (Dec. 17, 2011, 11:40 PM), <https://www.reuters.com/article/us-iraq-withdrawal/last-u-s-troops-leave-iraq-ending-war-idUSTRE7BH03320111218> [<https://perma.cc/8JLT-Y4FS>].

¹⁶³ Matt Compton, *President Obama Has Ended the War in Iraq*, THE WHITE HOUSE: BLOG (Oct. 21, 2011, 2:18 PM), <https://obamawhitehouse.archives.gov/blog/2011/10/21/president-obama-has-ended-war-iraq> [<https://perma.cc/CDX5-BSDK>].

government.¹⁶⁴ There was no longer a threat posed by Iraq, and any inherent authority to deal with postinvasion disorder ended when U.S. forces withdrew from the country. The last U.N. Security Council Resolution expired in 2008.¹⁶⁵ Even as the U.S. began the fight against ISIL in the summer of 2014, the National Security Advisor wrote that the “Iraq AUMF is no longer used for any U.S. government activities” and in the fall of 2014, the President stated, “[w]ith respect to Iraq, there was a very specific AUMF. We now have a different enemy.”¹⁶⁶ No justification remained to employ the 2002 AUMF in Iraq.

To the degree that the 2002 AUMF remains in force, the government’s arguments in the *Doe v. Mattis* litigation and its 2018 *Report on the Legal and Policy Frameworks Guiding the United States’ Use of Military Force and Related National Security Operations* fail to show that the 2002 AUMF applies to ISIL.¹⁶⁷ The government argues that the 2002 AUMF authorizes the use of force against ISIL to the extent it is “necessary to counter the threat that ISIL poses to a stable, democratic Iraq.”¹⁶⁸ Yet the text of the 2002 AUMF is clear and this analysis would not proceed beyond the first step of *Chevron* deference. The 2002 AUMF authorizes the use of force to deal with the threat posed by Iraq, not to Iraq.¹⁶⁹ ISIL posed a threat to Iraq, especially at the height of its power in 2014, but this threat is not being posed by Iraq.

Alternatively, there have been limited arguments that because former members of Saddam Hussein’s Ba’athist government joined ISIL as it gained momentum in Iraq, their membership in ISIL provides a sufficient link to the 2002 AUMF.¹⁷⁰ However, members of one organization who have ties to an AUMF-targeted group do not automatically make their new group fall under the AUMF. Despite the Al Qaeda ties of prominent leaders of Al Shabaab in

¹⁶⁴ Charlie Savage, *U.S. Transfers Its Last Prisoner in Iraq to Iraqi Custody*, N.Y. TIMES (Dec. 16, 2011), <https://www.nytimes.com/2011/12/17/world/middleeast/us-transfers-last-prisoner-to-iraqi-government.html> [https://perma.cc/EMX2-96B2].

¹⁶⁵ S.C. Res. 1790, ¶ 1 (Dec. 18, 2007); Chesney, *supra* note 159.

¹⁶⁶ William S. Castle, *The Argument for a New and Flexible Authorization for the Use of Military Force*, 38 HARV. J.L. & PUB. POL’Y 509, 525-26 (2015) (quoting Letter from Susan Rice, Nat’l Sec. Adviser, to John A. Boehner, Speaker of the U.S. House of Representatives (July 25, 2014); *The President Holds a Press Conference After the Midterm Elections*, WHITE HOUSE (Nov. 5, 2014), <https://obamawhitehouse.archives.gov/photos-and-video/video/2014/11/05/president-holds-press-conference-after-midterm-elections> [https://perma.cc/ZL6F-X2YN]).

¹⁶⁷ For the government’s arguments, see Respondent’s Factual Return, *supra* note 19, at 20-22; 2018 WHITE HOUSE REPORT, *supra* note 160, at 3.

¹⁶⁸ Respondent’s Factual Return, *supra* note 19, at 21; *see also* 2018 White House Report, *supra* note 160, at 3 (“[T]he 2002 AUMF . . . has always been understood to authorize the use of force for the related dual purposes of helping to establish a stable, democratic Iraq and for the purpose of addressing terrorist threats emanating from Iraq.”).

¹⁶⁹ 2002 AUMF, Pub. L. No. 107-243, § 3(a)(1), 116 Stat. 1498, 1501.

¹⁷⁰ MATTHEW C. WEED, CONG. RESEARCH SERV., R43760, A NEW AUTHORIZATION FOR USE OF MILITARY FORCE AGAINST THE ISLAMIC STATE: ISSUES AND CURRENT PROPOSALS 2-3 (2017).

Somalia, Defense Department General Counsel Jeh Johnson intervened in 2010 to stop a military strike on Al Shabaab because he concluded they were not an associated force of Al Qaeda.¹⁷¹ State Department Legal Advisor Harold Koh came to the same conclusion, arguing that targeting non-Al Qaeda affiliated members of Al Shabaab would be unlawful even though the leadership of one of the largest factions within the organization had declared allegiance to Al Qaeda and had “transnational ambitions.”¹⁷² The former Ba’athists in Iraq may have once belonged to Saddam’s government or military, but they have now joined a completely separate organization, with separate aims. Linking ISIL to the Ba’athist regime would stretch the 2002 AUMF to such an extent that the government does not make this argument in either the 2016 or 2018 White House reports or in litigation.

Accordingly, the 2002 AUMF does not provide authorization to use military force against ISIL, and the government would not have been able to keep Doe in military detention pursuant to that authority.

C. *Authorization by Appropriation*

The government also pointed to a string of appropriations related to the fight against ISIL as proof that Congress has authorized the fight in Iraq and Syria.¹⁷³ The first of these is the Consolidated and Further Continuing Appropriations Act, 2015, which granted \$5.6 billion for counter-ISIL operations.¹⁷⁴ The government also highlighted the Consolidated Appropriations Act, 2016, where the Explanatory Statement noted the threat posed by ISIL and the movement of funds to enable the military to conduct counter-ISIL operations, and the National Defense Authorization Act for Fiscal Year 2016, which noted that “defeating ISIL is critical to maintaining a unified Iraq.”¹⁷⁵ Yet none of these indicate an authorization comparable to war against ISIL or declare that the 2001 or 2002 AUMF applies to this fight.

The 2015 appropriations act appears to have incorporated much of the funding into the general Overseas Contingency Operations (OCO) funding line, which covers a broad range of overseas operations—not just the fight against ISIL.¹⁷⁶

¹⁷¹ Curtis A. Bradley & Jack L. Goldsmith, *Obama’s AUMF Legacy*, 110 AM. J. INT’L L. 628, 643 n.96 and accompanying text (2016) (citing SAVAGE, *supra* note 146, at 276-77).

¹⁷² SAVAGE, *supra* note 147, at 275, 277.

¹⁷³ 2016 WHITE HOUSE REPORT, *supra* note 101, at 15-16. The government states that the “funding, oversight, and authorizing measures do not *themselves* authorize the military campaign against ISIL; rather, they *confirm* that the campaign is authorized by the 2001 AUMF and . . . the 2002 Iraq AUMF.” Respondent’s Factual Return, *supra* note 19, at 24.

¹⁷⁴ 2016 WHITE HOUSE REPORT, *supra* note 101, at 6 n.26 and accompanying text.

¹⁷⁵ *Id.* at 6 n.27.

¹⁷⁶ Consolidated and Further Continuing Appropriations Act, 2015, Pub. L. No. 113-235, div. C, tit. IX, 128 Stat. 2130, 2285-95 (2014). The government refers to \$5.6 billion authorized under the

Approximately \$1.6 billion was appropriated directly for use against ISIL but only in the context of the Iraq Train and Equip program, allowing the U.S. military to train and equip vetted groups in the fight against ISIL.¹⁷⁷

The 2016 appropriations bill continues the provision of funds for the Train and Equip program,¹⁷⁸ and allows for the reimbursement of expenses for coalition allies in the fight against ISIL and in Afghanistan.¹⁷⁹ The Explanatory Statement cited by the 2016 White House Report mentions the rise of ISIL in conjunction with attacks in Paris, destabilizing actions by Iran, and Russian aggression in Ukraine as reasons to ensure that the military and Intelligence Community have the funding they need to anticipate threats.¹⁸⁰ The statement notes that funding is being moved into the OCO funding stream for operations in Afghanistan, increased theater security missions, and to maintain a global presence, as well as for counter-ISIL operations; but it does not define what those counter-ISIL operations are.¹⁸¹ The appropriations bill itself only funds the Train and Equip program, making it an inappropriate basis on which the Administration should ground its authority for a broader conflict.¹⁸²

Finally, in the 2016 NDAA, while Congress does express concern about ISIL and highlights the importance of its defeat, the Act only states that the U.S. should provide a mission, defense articles, defense services, and related training to the government of Iraq and allied entities in the fight against ISIL.¹⁸³ The most explicit authorization for U.S. action against ISIL comes from the 2015 NDAA, which authorizes the Secretary of Defense to “provide assistance, including training, equipment, logistics support, supplies, and services, stipends, facility and infrastructure repair and renovation, and sustainment, to military and other security forces of or associated with the Government of Iraq, including Kurdish and tribal security forces or other local security forces” in order to defend Iraq against ISIL.¹⁸⁴

Act “for the express purpose of carrying out specific military activities against ISIL in Iraq and Syria” in the 2016 White House Report. *See* 2016 WHITE HOUSE REPORT, *supra* note 101, at 6 & n.26. There is no indication that the general amounts authorized under OCO funding are meant to confirm any authorization against ISIL.

¹⁷⁷ Consolidated and Further Continuing Appropriations Act of 2015, div. C, tit. IX, 128 Stat. at 2290.

¹⁷⁸ Consolidated Appropriations Act of 2016, Pub. L. 114-113, tit. IX, 129 Stat. 2242, 2386-87 (2015).

¹⁷⁹ *Id.* tit. IX, 129 Stat. at 2383.

¹⁸⁰ H. COMM. ON APPROPRIATIONS, 114TH CONG., CONSOLIDATED APPROPRIATIONS ACT, 2016, at 289 (Comm. Print 2016).

¹⁸¹ *Id.*

¹⁸² Consolidated Appropriations Act of 2016, tit. IX, 129 Stat. at 2386; H. COMM. ON APPROPRIATIONS, 114TH CONG., *supra* note 178, at 289.

¹⁸³ National Defense Authorization Act for Fiscal Year 2016 (2016 NDAA), Pub. L. No. 114-92, § 1223(a), 129 Stat. 726, 1049 (2015).

¹⁸⁴ Carl Levin and Howard P. “Buck” McKeon National Defense Authorization Act for Fiscal Year 2015 (2015 NDAA), Pub. L. No. 113-291, § 1236(a), 122 Stat. 3292, 3558-3559 (2014).

None of these is an explicit authorization to use force against ISIL that would lead one to understand that it came with an unmistakable authorization for detention as an incident of war.¹⁸⁵ The Supreme Court has emphasized the importance of being explicit when authorizing via appropriations.¹⁸⁶ In *Ex parte Endo*, the Court stated that when attempting to authorize through appropriation, “the appropriation must plainly show a purpose to bestow the precise authority which is claimed,” and Congress cannot do that if a lump sum appropriation is made to an “overall program of the Authority and no sums were earmarked for the single phase of the total program” in question.¹⁸⁷ This need for explicit wording is especially important in areas of “doubtful constitutionality” because such an authorization “requires careful and purposeful consideration by those responsible for enacting and implementing our laws.”¹⁸⁸ By appropriating funds to the general OCO account, the appropriations cannot show a specific purpose.

It does not matter that Congress authorized and appropriated funds for the Train and Equip program to counter ISIL. That cannot be taken as a broader authorization for military force. The Constitution delegated to Congress the ability to use a sliding scale for how much force can be authorized—from war to letters of marque and reprisal.¹⁸⁹ Just as the President could not authorize the seizure of ships sailing from French ports when Congress had only authorized the seizure of ships sailing to French ports,¹⁹⁰ the President cannot authorize combat operations against ISIL when Congress has only authorized the Train and Equip program.

Given that Congress has not authorized the use of force against ISIL through appropriations and has not authorized the fight against ISIL through the 2001 or 2002 AUMFs, there was no act of Congress providing authority for the military to detain Doe outside of the judicial process. To do so would be a violation of the Non-Detention Act.¹⁹¹ The government will similarly be confined to the traditional judicial process if it gains custody of any of the remaining American SDF prisoners.

IV. ARTICLE II AUTHORITY

Lacking congressional authority, the government also made an appeal to the powers inherent under Article II of the Constitution that are afforded to the President as Commander in Chief. The government contends that

¹⁸⁵ See *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (plurality opinion).

¹⁸⁶ *WORMUTH & FIRMAGE*, *supra* note 62, at 226.

¹⁸⁷ *Id.* (quoting *Ex parte Endo*, 323 U.S. 283, 303 n.24 (1944)).

¹⁸⁸ *Green v. McElroy*, 360 U.S. 474, 507 (1959).

¹⁸⁹ U.S. CONST. art. I, § 8, cl. 11.

¹⁹⁰ See *supra* notes 59–61 and accompanying text.

¹⁹¹ 18 U.S.C. § 4001(a) (2018).

because it has the independent authority to deploy military forces around the world, the President can detain combatants for as long as U.S. forces are engaged on a given battlefield.¹⁹² Specifically, the government points to historical practice, noting that the executive has used military force repeatedly without congressional approval in recent decades—most recently in Libya in 2011 and Syria in 2017.¹⁹³ Because U.S. forces were fighting against ISIL in Syria, the government argued that the U.S. military could detain Doe as a “fundamental incident of waging war” until hostilities ended, U.S. forces left the theater of operations, or the military was able to arrange a release of Doe in a way that did not endanger U.S. forces.¹⁹⁴

This expansive interpretation of executive power undermines the clear writing of the Constitution and the intentions of the Founding Fathers. In his famous *Youngstown* concurrence, Justice Robert Jackson warned against expansive claims of “inherent” presidential power since the Founders “knew what emergencies were, knew the pressures they engender for authoritative action, [and] knew, too, how they afford a ready pretext for usurpation.”¹⁹⁵ Article I of the Constitution gives Congress the power to declare war and to issue letters of marque and reprisals.¹⁹⁶ “There is little evidence that . . . the Framers intended more than to establish in the Presidency civilian command of the armed forces during wars declared by Congress”¹⁹⁷ This is because the Framers wanted to move away from the powers held by the British king and his ability to declare and direct war.¹⁹⁸ The Framers were intentional in their use of separation of powers throughout the Constitution in order to let each branch check the judgment of the others.¹⁹⁹ By incorporating this separation of powers in foreign policy with regards to the power to declare war, the Framers sought to break the link they saw between war power and “executive (monarchical) authority.”²⁰⁰ James Wilson captured this desire when he noted that this system of separation of powers in foreign affairs

¹⁹² Respondent’s Factual Return, *supra* note 19, at 25.

¹⁹³ *Id.* at 26.

¹⁹⁴ *Id.* at 27-28 (quoting *Hamdi v. Rumsfeld*, 542 U.S. 507, 519 (2004) (plurality opinion)).

¹⁹⁵ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 650 (1952) (Jackson, J., concurring).

¹⁹⁶ U.S. CONST. art. I, § 8, cl. 11.

¹⁹⁷ HENKIN, *supra* note 48, at 45.

¹⁹⁸ *Id.* at 45-46.

¹⁹⁹ As James Madison explained,

Those who are to *conduct a war* cannot in the nature of things, be proper or safe judges, whether *a war ought to be commenced, continued, or concluded*. They are barred from the latter functions by a great principle in free government, analogous to that which separates the sword from the purse, or the power of executing from the power of enacting laws.

STEPHEN M. GRIFFIN, *LONG WARS AND THE CONSTITUTION* 21 (2013) (quoting 15 THE PAPERS OF JAMES MADISON, 24 MARCH 1793–20 APRIL 1795, at 71 (Robert A. Rutland et al. eds., 1985)).

²⁰⁰ *Id.* at 23.

would “guard against” hurrying into war because “[i]t will not be in the power of a single man, or a single body of men, to involve us in such distress; for the important power of declaring war is vested in the legislature at large.”²⁰¹

The Founding Fathers did not view the Declare War Clause in a narrow technical, international law sense, but instead viewed it expansively as authorizing the nation to enter into hostilities of varying intensities.²⁰² Each of the first three American presidents sought authorization from Congress for actions less than full scale war:

George Washington emphasized that he did not have independent power to use military force against hostile tribes on the Western frontier. President John Adams did not dispute that the quasi-war with France needed Congress’s approval President Thomas Jefferson acknowledged that Congress’s approval was required to go beyond defensive measures with regard to Tripoli.²⁰³

This consistent interpretation provides guidance on when the President can use force abroad.

This does not mean that the President must get congressional authorization for every use of military force. The President also maintains the ability to respond to direct threats to the country. The Founders clearly intended for the President to have the ability to repel attacks against the U.S.²⁰⁴ and “it is plausible that limited military operations to rescue or protect U.S. citizens abroad, so long as the operations do not involve material challenges to or material engagement with the territorial sovereign, would not amount to initiation of war.”²⁰⁵ This understanding would allow the President to conduct rescue operations for Americans held hostage, conduct noncombatant evacuation operations of American civilians trapped in combat zones, and intervene to disrupt a terrorist plot against the United States. But this would not extend to committing U.S. forces to long-term combat engagements overseas without congressional approval.

The argument from practice holds that this history and the clear text of the Constitution is not the final arbiter. Instead, when the President uses force abroad without congressional approval, he creates precedents that expand his scope of legal authority for independent actions.²⁰⁶ This is due to

²⁰¹ Fisher, *supra* note 53, at 13.

²⁰² GRIFFIN, *supra* note 199, at 35.

²⁰³ Michael D. Ramsey, *Constitutional War Initiation and the Obama Presidency*, 110 AM. J. INT’L L. 701, 703 (2016) (footnotes omitted).

²⁰⁴ Fisher, *supra* note 53, at 13.

²⁰⁵ Ramsey, *supra* note 203, at 704.

²⁰⁶ Curtis A. Bradley & Jean Galbraith, *Presidential War Powers as an Interactive Dynamic: International Law, Domestic Law, and Practice-Based Legal Change*, 91 N.Y.U. L. REV. 689, 705 (2016).

the historic gloss that practice places on the Constitution when “systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned . . . mak[es] as it were such exercise of power part of the structure of our government.”²⁰⁷ Curtis Bradley and Jean Galbraith note the use of these executive actions as precedents by the Office of Legal Counsel (OLC) to create a framework that OLC uses to justify further executive action.²⁰⁸ For example, in justifying the use of force against Libya in 2011, OLC stated that “the President has the power to commit United States troops abroad, as well as to take military action, for the purpose of protecting important national interests, even without specific prior authorization from Congress.”²⁰⁹ In doing so, OLC pointed to the use of force in Libya (1986), Panama (1989), Somalia (1992), Bosnia (1993–1995), Haiti (1994, 2005), and Yugoslavia (1999), which all occurred without congressional authorization, as indicating the right of the executive to utilize a broad constitutional power in using force.²¹⁰ Additionally, the Supreme Court has noted that “[i]n separation-of-powers cases this Court has often ‘put significant weight upon historical practice.’”²¹¹

Yet there are reasons to doubt that this gloss is fully appropriate in this context. First, it is not clear that unilateral presidential use of force is a “systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned” to the degree that its supporters portray it.²¹² Most of the military actions taken since Vietnam have been done either with congressional approval, to rescue U.S. citizens, or to respond to an attack on U.S. forces or facilities, eliminating their relevance in demonstrating a more expansive Article II power under historical gloss.²¹³ And Congress has not been silent when the executive has acted outside of these limited circumstances.²¹⁴ In 2011, Congress rejected an authorization to use force against Libya by a vote of 123–295.²¹⁵ Congress also rejected a

²⁰⁷ *Id.* (alterations in original) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring)).

²⁰⁸ *Id.* at 706.

²⁰⁹ Auth. to Use Military Force in Libya, 2011 WL 1459998, at *6 (O.L.C. Apr. 1, 2011) (internal quotations omitted).

²¹⁰ *Id.* at *7.

²¹¹ *Zivotofsky ex rel. Zivotofsky v. Kerry* (*Zivotofsky II*), 135 S. Ct. 2076, 2089–90 (2015).

²¹² *Youngstown*, 343 U.S. at 610–611 (Frankfurter, J., concurring).

²¹³ See Ramsey, *supra* note 203, at 717 app. (listing presidential uses of force from 1975–2008).

²¹⁴ Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 466 nn.236–239 and accompanying text (2012) (describing congressional resolutions to support such actions that were defeated and resolutions expressing opposition to such actions that passed).

²¹⁵ H.R.J. Res. 68, 112th Cong. (2011); 157 CONG. REC. H4549–H4550 (daily ed. June 24, 2011) (Vote Roll No. 493).

resolution to authorize the use of force in Kosovo in 1999.²¹⁶ Requiring Congress to overturn the executive use of force by passing a resolution explicitly denying authorization or denying funding would turn the constitutional requirement on its head—mandating a 2/3 vote in each chamber of Congress to stop a war initiated unilaterally by the President.²¹⁷

Instead, when the President acts, it must be based on a grant of power from the Constitution—“one cannot derive an *ought* from an *is*.”²¹⁸ The traditional arguments for applying a historical gloss on constitutional interpretation and applying a doctrine related to congressional acquiescence do “not accurately reflect the dynamics of modern congressional–executive relations” and are “an especially inapt description of congressional behavior.”²¹⁹ As Justice Jackson noted in *Youngstown*, “[p]arty loyalties and interests, sometimes more binding than law, extend [the President’s] effective control into branches of government other than his own and he often may win, as a political leader, what he cannot command under the Constitution.”²²⁰ Thus, what the President may be able to achieve politically does not provide adequate justification for turning the constitutional order upside down.

Yet even if the President were to have Article II authority to use force against ISIL, either to protect U.S. forces in Iraq and the Middle East or to prevent attacks against the United States and its citizens, the President still lacked authority to keep Doe in military detention indefinitely. Justice Jackson’s concurrence in *Youngstown* sets out a framework by which the courts regularly evaluate separations of powers cases.²²¹ When the President acts with congressional authorization, his authority is at its maximum; when the President acts in the absence of any indication from Congress, he is in a “zone of twilight” in which the authority to act beyond the President’s own Article

²¹⁶ S. Con. Res. 21, 106th Cong. (1999); 145 CONG. REC. H2384-H2385 (daily ed. Apr. 28, 1999) (Vote Roll No. 99).

²¹⁷ As Peter Raven-Hansen explains,

The constitutional rule the Framers enacted was that peace continues *until* Congress speaks, not that war goes forward *unless* Congress speaks The opposite rule shifts the burden of going forward . . . and presents at least the mathematical possibility that just thirty-four Senators . . . and the President could make war.

Peter Raven-Hansen, *Constitutional Constraints: The War Clause, in* THE U.S. CONSTITUTION AND THE POWER TO GO TO WAR: HISTORICAL AND CURRENT PERSPECTIVES, *supra* note 35, at 35.

²¹⁸ *Id.* at 31.

²¹⁹ Bradley & Morrison, *supra* note 214, at 414.

²²⁰ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 654 (1952) (Jackson, J., concurring).

²²¹ *Medellin v. Texas*, 552 U.S. 491, 524 (2008) (“Justice Jackson’s familiar tripartite scheme provides the accepted framework for evaluating executive action in this area.”); *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring in part) (“The proper framework for assessing whether executive actions are authorized is the three-part scheme used by Justice Jackson in his opinion in *Youngstown*.”).

II powers is unclear, but may depend on the “imperatives of events”; and when the President acts in opposition to the will of Congress, his power is at its lowest and he can only act within his own Article II powers minus any powers Congress has over the issue.²²²

In the present case, Congress has acted and restricted the President’s authority by passing the War Powers Resolution and the NDA.²²³ The War Powers Resolution requires the President to terminate the use of the U.S. military abroad “unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States.”²²⁴ As detailed in Part III, Congress has not provided specific authorization for the fight against ISIL, and there has been no extension or attack preventing Congress from meeting. With well over 60 days running since the commencement of operations against ISIL in 2014, even if the President had initial authority to combat ISIS, the President has long been in *Youngstown* category III when considering the ongoing operations against ISIL. To whatever degree Article II proponents dismiss the earlier arguments in this Part, the War Powers Resolution is a clear action by Congress to restrict executive overreach. Without authority to wage the war against ISIL, the President will also lack the incidental authorities that could come with it, such as the detention of prisoners.

Meanwhile, the NDA restricts the President’s ability to detain Americans such as Doe indefinitely. The government contends that the NDA only applies to civilian prisons and civilian detentions and does not apply to the military because it falls under the criminal code and replaced a broad civilian detention authority.²²⁵ This conflicts with the history of the statute. While it was passed in order to replace a broader civilian detention authority, it was also passed with the intent to prevent military detentions like those imposed against American citizens of Japanese descent during World War II.²²⁶ This linkage to military detentions makes it clear that Congress sought to provide protections for any citizen facing detention, not just those facing civilian detention.²²⁷ Given the restriction in the NDA on the President’s authority to detain, the indefinite military detention of Doe occurs under the third category of Justice Jackson’s

²²² *Youngstown*, 343 U.S. at 635-38 (Jackson, J., concurring).

²²³ 18 U.S.C. § 4001(a) (2018); 50 U.S.C. §§ 1541-1549 (2018).

²²⁴ 50 U.S.C. § 1544(b).

²²⁵ Respondent’s Factual Return, *supra* note 19, at 27 n.28. The government has argued this in previous military detention cases as well. *E.g.*, *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (plurality opinion).

²²⁶ *Hamdi*, 542 U.S. at 542-43 (Souter, J., concurring).

²²⁷ *Id.* at 543.

Youngstown framework. With the President at his lowest level of authority, his Article II powers cannot override the restrictions of the NDA, meaning that he cannot detain Doe without an act of Congress.²²⁸

With the President lacking authority to use military force against ISIL either through Congress or his own Article II powers, the indefinite detention of a U.S. citizen is not permissible.

CONCLUSION

Without legal authorization for war against ISIL under either congressional action or inherent Article II authority, the government faced significant risk of defeat in litigation over Doe's habeas petition. The prospect of releasing someone while so much evidence pointed towards him being a member of ISIL is disconcerting.²²⁹ Given his training and knowledge, it is likely that most Americans would not want him walking free. However, the government likely did not want to risk a setback for its war powers and instead chose to set Doe free. The United States reached this point because of a failure of the legislative and executive branches. Instead of holding Doe in military detention in Iraq, away from the battlefield in Syria, the government could have transferred him back to the United States for a trial under federal criminal law. The U.S. court system has a successful track record prosecuting those who provide material support to a terrorist

²²⁸ 18 U.S.C. § 4001(a). While the argument has not been raised elsewhere, the government could contend that the presumption against extraterritoriality restricts the reach of the NDA to conduct occurring within the United States. *See generally* *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (holding that a presumption against extraterritoriality applies unless Congress clearly expressed a contrary intent). However, even if a court concluded that the NDA did not prohibit the United States government from seizing and detaining U.S. citizens abroad, two factors would help courts reach a conclusion that leaves the analysis in this Comment unchanged. First, the right to seek habeas relief and force the government to provide a justification for holding a citizen turns not on a broad notion of territorial sovereignty but instead on "the practical question of 'the exact extent and nature of the jurisdiction or dominion exercised in fact'" by the government. *Rasul v. Bush*, 542 U.S. 466, 482 (2004) (quoting *Ex parte Mwenya*, [1960] 1 Q.B. 241, 303 (Eng.) (Lord Evershed MR)). The U.S. government held control of Doe under its own power and was using its own laws to keep him detained—giving him a right to claim habeas. Second, the Jackson framework outlined in *Youngstown* allows for congressional will to be implied. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Even if not an express prohibition on government action abroad, the NDA appears to provide an implied expression of congressional will that the executive only detain those citizens it has been authorized to detain. This implicit expression can be seen in the fact that: 1) the NDA was passed during a time when the presumption against extraterritoriality was seen as obsolete, *see* William Dodge, *Understanding the Presumption Against Extraterritoriality*, 16 BERKLEY J. INT'L L. 85, 86 (1998), and (2) to conclude otherwise would risk executive detention of American citizens abroad without legislative authorization—conduct Congress gave no indication of wanting to carve out of the NDA's broad language.

²²⁹ *See supra* notes 19–24 and accompanying text (detailing the evidence the government has presented to argue that Doe was an ISIL fighter).

organization and is more than competent to handle the case of a U.S. citizen accused of supporting ISIL, as is now underway in the cases of Clark and Kuzu.²³⁰ Alternatively, Congress could have authorized the use of military force against ISIL, which would have carried the authority to detain enemy combatants along with it.²³¹ When it stormed into the international scene in 2014, ISIL posed a serious and dire threat to the government of Iraq. ISIL also demonstrated a willingness to kill civilians en masse, threaten Americans, inspire attacks against the U.S., and support attacks against U.S.-allied nations in Europe. Congress could have made an argument to the American public that this was a threat that needed to be countered and voted on an ISIL-focused AUMF. But Congress failed to act.

The courts should not wade into this debate in order to voice their thoughts about the policy of fighting ISIL, but they must not shy away from adjudicating the legality of the fight in order to determine whether American citizens can be held without trial.

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²³⁰ E.g., Minute Entry for Jury Trial held before Judge Christopher R. Cooper as to AHMED SALIM FARAJ ABU KHATALLAH on 11/28/2017 as to Counts 1s,2s,3s,4s-6s,7s-9s,10s-13s,14s-15s,16s-17s,18s, United States v. Abukhatallah, No. 14-0141 (D.D.C. Oct. 30, 2017) (finding the defendant guilty on terrorism charges for his role in the September 2012 attack on the American compound in Benghazi, Libya); Indictment, *supra* note 17; Karen J. Greenberg, *Prosecuting Terrorists in Civilian Courts Still Works*, ATLANTIC (Nov. 20, 2017), <https://www.theatlantic.com/international/archive/2017/11/isis-trump-terrorist-obama-court-military-guantanamo/546296/> [https://perma.cc/42YT-2HNT].

²³¹ See Letter from Barack Obama, President, United States of America, to Congress (Feb. 11, 2015), <https://obamawhitehouse.archives.gov/the-press-office/2015/02/11/letter-president-authorization-use-united-states-armed-forces-connection> [https://perma.cc/T22E-9WNV] (proposing a new AUMF to combat the threat from ISIL).